

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert L. & Rita Pinck : AFFIDAVIT OF MAILING
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 :
1977.

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

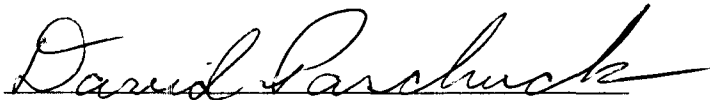
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of January, 1984, he served the within notice of Decision by certified mail upon Robert L. & Rita Pinck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

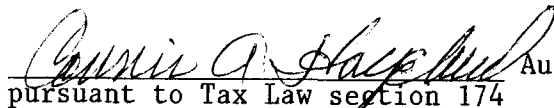
Robert L. & Rita Pinck
165 Hoover Dr.
Cresskill, NJ 07626

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
20th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert L. & Rita Pinck : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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Tax under Article 22 of the Tax Law for the Year :
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State of New York }
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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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Seymour Goldberg, 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 Goldberg
666 Old Country Rd., Suite 306
Garden City, NY 11530

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
20th day of January, 1984.

David Parchuck

James A. Heggenrud
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 20, 1984

Robert L. & Rita Pinck
165 Hoover Dr.
Cresskill, NJ 07626

Dear Mr. & Mrs. Pinck:

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
Seymour Goldberg
666 Old Country Rd., Suite 306
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT L. PINCK AND RITA PINCK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioners, Robert L. Pinck and Rita Pinck, 165 Hoover Drive, Cresskill, New Jersey 07626, 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 1977 (TAB No. 34072).

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 March 8, 1983 at 11:00 A.M., with all briefs to be submitted by June 23, 1983. Petitioner appeared by Seymour Goldberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division was precluded from raising section 632 of the Tax Law as a basis upon which the deficiency at issue was premised, due to a lack of reference to such section prior to the hearing.

II. Whether petitioners were required to include in their New York adjusted gross income the amount of contributions to petitioner Robert L. Pinck's pension plan, made and deducted by a professional corporation of which he was a shareholder, in excess of the amount of such contributions which would have been deductible by a self-employed individual.

III. Whether, in the event such excess contributions were includable in New York adjusted gross income, petitioners should be permitted to deduct such excess from New York adjusted gross income in a future year if petitioner Robert L. Pinck elects to receive his pension benefits as an annuity in such (future) year.

FINDINGS OF FACT

1. On or about July 6, 1978, petitioners, Robert L. Pinck and Rita Pinck, husband and wife, jointly filed a New York State Income Tax Nonresident Return (Form IT 203/209) for the year 1977. Petitioner Robert L. Pinck also filed, for the same year, a Nonresident Earnings Tax Return for the City of New York (Form NYC-203). Petitioners returns were timely filed pursuant to an extension allowing filing by September 15, 1978.

2. On March 25, 1981, the Audit Division issued a Notice of Deficiency to petitioners, asserting additional tax due for 1977 in the amount of \$3,677.02, plus interest. A Statement of Audit Changes issued previously to petitioners on August 14, 1980, provided explanation of the asserted deficiency as follows:

"Section 612(b)(7) of the New York Tax Law requires a shareholder of a professional corporation to add to his Federal adjusted gross income the excess of the amount deductible by the corporation as a contribution to certain employee plans for pensions, sharing, annuity and bond purchase over what would have been deductible by a self-employed individual.

Section 612(b)(8) of the New York State Tax Law requires a shareholder of a professional corporation to add to his Federal adjusted gross income the amount of taxes paid by the corporation for old age, survivors and disability insurance on FICA wages for the calendar year of the shareholder. This does not include payment for Hospital (Medicare) Insurance.

Adjustment:	Section 612(b)(7) - Pensions	\$23,696.72
	Section 612(b)(8) - FICA	816.75
Total Adjustment		<u>\$24,513.47</u>

Personal Income Tax Due on Above @ 15% \$3,677.02"

3. Petitioners were, during 1977, residents of New Jersey. Petitioner Robert L. Pinck is a physician who, according to Wage and Tax Statements attached to petitioners' tax returns, received wages in 1977 from Long Island College Hospital and from Robert L. Pinck, M.D., P.C., both of which listed their address as 340 Henry Street, Brooklyn, New York¹.

4. The adjustments at issue herein involve modifications increasing petitioners' adjusted gross income based on certain payments made by the professional service corporation (Robert L. Pinck, M.D., P.C.) in which Robert Pinck was a shareholder. These adjustments consisted of:

a.) taxes of \$816.75 paid by the professional corporation on F.I.C.A. wages for old age, survivors and disability (but not medicare) insurance [\$612(b)(8)];

b.) those deductible contributions of \$23,696.72 made by the professional corporation to its employee pension plan which exceeded the amount Robert Pinck could have deducted under a Keogh Plan had he been self employed [\$612(b)(7)].

5. Petitioners assert that section 612 of the Tax Law pertains only, by its terms, to New York resident individuals, and thus it is inapplicable to the non-resident petitioners' 1977 income. The Audit Division asserted, at the hearing, that section 612 is incorporated into section 632 pertaining to non-resident individuals and thus the assessment was valid against the non-resident petitioners. Petitioners maintain that the Audit Division's failure to specify section 632 in its Statement of Audit Changes or its answer to petitioners' petition², or at any other time prior to the hearing, precludes the Audit Division from raising such section at the hearing as a basis for the

¹ Petitioner Rita Pinck's name appears herein solely as the result of having filed a joint return with petitioner Robert L. Pinck.

² Petitioners' original petition was deemed acceptable as a perfected petition and thus no separate perfected petition was required to be filed.

asserted deficiency. Petitioners assert further that the first two sentences of their petition gave notice to the Audit Division prior to the hearing as to the impropriety of the adjustments under section 612, by stating:

"Taxpayer Robert L. Pinck has been a nonresident of New York State and a resident of New Jersey since 1970. The adjustment made to his nonresident New York State income tax return for 1977 under section 612(b)(7) - Pensions in the amount of \$23,696.72 is improper".

6. Except with regard to the aforementioned alleged impropriety in the manner of assessment, petitioners do not otherwise contest the adjustment made under section 612(b)(8). However, petitioners do contest the section 612(b)(7) adjustment. Petitioners cited 20 NYCRR 131.4(d) in their petition, asserting that if petitioner Robert L. Pinck, as a nonresident, elects in the future to receive his pension benefits as an annuity, such benefits would not be taxable. Thus, petitioners maintain, since Robert L. Pinck had not yet retired or elected the form in which he would receive his pension benefits, it was premature to mandate inclusion of excess pension contributions in his 1977 adjusted gross income.

7. Petitioners argue finally, in the alternative, that if the excess pension contributions are required to be included in petitioners' 1977 adjusted gross income, such amount should be allowed as a deduction in the (future) year in which Robert L. Pinck elects to receive his pension benefits in the form of an annuity.

8. It was not contested that in 1977 petitioners were nonresidents of New York, that the items at issue were derived from a business, trade, profession or occupation carried on in New York, that petitioner Robert L. Pinck was not then retired and that no election had as then been made determining the form in which he would, in the future, be receiving his pension benefits. Finally, the dollar amounts of the adjustments were not contested.

CONCLUSIONS OF LAW

A. That section 632 of the Tax Law provides in relevant part as follows:

"New York adjusted gross income of a nonresident individual -
(a) General - The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

* * *

(2) The portion of the modification described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner)."

B. That subdivision (b) of section 632 of the Tax Law provides in relevant part as follows:

"Income and deductions from New York sources - (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) The ownership of any interest in real or tangible personal property in this state; or

(B) A business trade, profession or occupation carried on in this state".

C. That subdivision (a) of section 612 of the Tax Law provides as follows:

"New York adjusted gross income of a resident individual - (a) General - The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year with the modifications specified in this section".

Among the modifications contained in subdivision (b) of section 612 are those at issue herein; specifically at paragraph (7), pertaining to deductions for contributions by professional service corporations to pension plans for its shareholders which exceed the amount of such contributions deductible by a self-employed individual, and at paragraph (8), pertaining to taxes paid by

professional service corporations on F.I.C.A. wages for old age, survivors and disability (but not Medicare) insurance.

D. That under the facts presented herein the Audit Division was not estopped from citing section 632 of the Tax Law at the hearing by virtue of its failure to specify such section prior to the hearing in either the Statement of Audit Changes or the answer. (cf Matter of Bruce O. Becker and Rosalie Becker, State Tax Comm., October 3, 1980). Nor is the burden of proof shifted to the Audit Division [See Tax Law section 689(e)]. The Statement of Audit Changes specified the statutory sections wherein the modifications responsible for the deficiency at issue were contained. No distinction was made between the status of resident or nonresident, it being the Audit Division's position that the instant modifications were in any event mandatory. Petitioners have not claimed surprise or other disadvantage, but simply claim the Audit Division is precluded from raising section 632. In fact, it is noted that petitioners' petition cites 20 NYCRR 131.4(d), the heading of which refers parenthetically to Tax Law section 632(b)(1)(B). Petitioners were thus not unaware of section 632.

E. That section 632 of the Tax Law makes the section 612(b)(7) and (8) modifications at issue applicable in the determination of a nonresident's New York adjusted gross income to the extent that the amounts of such items of modification are derived from or connected to New York sources. There is no argument advanced that the sums at issue constituting the modifications were not derived from or connected with New York sources; specifically from Robert L. Pinck, M.D., P.C., 340 Henry Street, Brooklyn, New York. Hence, the modifications were mandatory and the Audit Division's redetermination of petitioners' 1977 tax liability is sustained.

F. That the section 612(b)(7) modification involves a mandatory add back of pension contributions made and deducted by the professional service corporation on behalf of its shareholder, Robert L. Pinck, which exceeded those deductible contributions allowable to a self-employed individual. That regulations of the State Tax Commission in effect during the period at issue provided as follows:

"Pensions or other retirement benefits constituting an annuity.

(1) General - Where an individual formerly employed in New York is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable if the individual receiving it is a nonresident and if it constitutes an annuity as herein defined."
[20 NYCRR 131.4(d)].

G. That the taxable or non-taxable status of amounts to be drawn from the pension plan by Robert L. Pinck in the future had no bearing on the issue of the mandatory modification specified by section 612(b)(7) of the Tax Law³. There is no authority in the Tax Law or regulations by which the State Tax Commission may determine at present the status (i.e. deductibility, exclusion from income, etc.) of amounts to be paid out to petitioner Robert L. Pinck in future years. Such a determination would be not only inappropriate but premature, given the fact that no choice had, as of 1977, been made as to the form, annuity or otherwise, in which Robert L. Pinck would be receiving his pension benefits, or that the form of such benefit payment, when chosen, would qualify

³ The modification provided for in section 612(b)(7) of the Tax Law was added by the Laws of 1970, Chapter 974 by way of Senate Bill 8052 (see New York State Legislative Annual - 1970, pp. 126, 131). Section 612(c)(12) of the Tax Law, also enacted as a part of Senate Bill 8052, provides for the subtraction from New York adjusted gross income of amounts previously included therein in prior years pursuant to section 612(b)(7) of the Tax Law. Accordingly, petitioner would not be without relief should it be determined, in the future, that all or a portion of his pension benefits did not qualify for exemption under 20 NYCRR 131.4(d)(2) or otherwise.

as an annuity under 20 NYCRR 131.4(d)(2). Finally, it could not be known in 1977 whether petitioner Robert L. Pinck would be a nonresident at the time he ultimately begins to receive his pension benefits.

I. That the petition of Robert L. Pinck and Rita Pinck is hereby denied and the Notice of Deficiency dated March 25, 1981 is sustained.

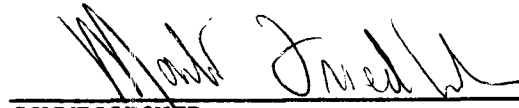
DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984


PRESIDENT


COMMISSIONER


COMMISSIONER