

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Brian Weinberg :
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 Years 1970 :
& 1971. :

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 15th day of June, 1984, he served the within notice of Decision by certified mail upon Brian Weinberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brian Weinberg
2086 Bronx Park East
Bronx, NY 10462

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
15th day of June, 1984.

David Parchuck

[Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 15, 1984

Brian Weinberg
2086 Bronx Park East
Bronx, NY 10462

Dear Mr. Weinberg:

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	:	
BRIAN WEINBERG	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1970 and 1971.	:	

Petitioner, Brian Weinberg, 2086 Bronx Park East, Bronx, New York 10462, 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 1970 and 1971 (File No. 32679).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1983 at 9:00 A.M., with all briefs to be submitted by February 22, 1983. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division's method of recomputing petitioner's 1970 and 1971 New York State income tax liability, premised on Federal adjustments, was proper, where petitioner's Federal income tax liability for said years was recomputed under the "claim of right" provisions of I.R.C. §1341.

FINDINGS OF FACT

1. Petitioner herein, Brian Weinberg, together with his wife, Laura Weinberg,¹ filed joint New York State income tax resident returns for the years

¹ Laura Weinberg, although included in the Notice of Deficiency dated September 8, 1980, infra, did not file a petition for redetermination nor was she represented by Brian Weinberg. Accordingly, she is not considered a party to this proceeding.

1970 and 1971. On his 1970 return, petitioner reported a net business loss of \$2,578.49 generated from his activities as a commissioned salesman of jewelry. The aforementioned net loss of \$2,578.49 was computed in the following manner:

Gross receipts	\$35,622.31
Less: escrow payments	(26,000.00)
other business expenses	(12,200.80)
Net loss	<u>(\$ 2,578.49)</u>

2. On March 13, 1980, the Audit Division issued a Statement of Audit Changes to petitioner for the years 1970 and 1971 containing the following explanation:

"Your New York State income tax liability has been recomputed based upon final Federal audit of your Federal income tax returns by the Internal Revenue Service.

When a taxpayer repays an amount previously reported as income received or held under a claim of right within the meaning of Section 1341 of the Internal Revenue Code, it is the position of the Department that the repayment constitutes an allowable deduction for the year in which the amount is repaid regardless of whether the Federal income tax for the year of repayment is computed under Section 1341(a)(4) or Section 1341(a)(5) of the Internal Revenue Code. Accordingly, a deduction has been allowed for the tax year 1971."

The Statement of Audit Changes proposed to increase petitioner's 1970 taxable income by \$28,504.36 and decrease 1971 taxable income by \$5,056.66. Alleged tax due for 1970 of \$2,396.19 was reduced by a proposed refund due petitioner for 1971 of \$155.80, for a net tax due of \$2,240.39. In accordance with the aforementioned Statement of Audit Changes, the Audit Division, on September 8, 1980, issued a joint Notice of Deficiency to petitioner and Laura Weinberg, imposing additional tax due of \$2,240.39, plus interest of \$1,268.39, for a total due of \$3,508.78.

3. The Audit Division, via a letter dated June 18, 1980, advised petitioner that the reduction in 1971 taxable income was increased from \$5,056.66 to \$20,241.88. This additional reduction did not result in any further refund since the original reduction to taxable income of \$5,056.66 decreased petitioner's 1971 New York State income tax to zero.

4. Petitioner's 1970 U.S. Individual Income Tax Return was examined by the Internal Revenue Service and said examination resulted in the disallowance of the \$26,000.00 escrow payment and \$2,504.36 of other business expenses. Additional Federal income tax due for 1970 amounted to \$7,266.36. On October 20, 1974, petitioner amended his 1971 U.S. Individual Income Tax Return, wherein he claimed that commission income of \$20,241.88 included in 1970 gross income was paid over to the Zale Corporation in 1971 and that he was therefore entitled to recompute his 1971 Federal income tax liability using the "claim of right" provisions of section 1341 of the Internal Revenue Code. Petitioner's 1971 amended Federal return claimed a refund of \$6,665.55 using the provisions of section 1341(a)(5) of the Code, which provision provided for the 1971 Federal tax liability to be computed without the \$20,241.88 deduction, but with a credit for the decrease in tax for 1970 which would result solely from the exclusion of the \$20,241.88 from 1970 gross income.

5. The Internal Revenue Service applied petitioner's refund for 1971 against the tax due for 1970 and the balance due, to wit \$600.81, plus interest, was paid by petitioner on August 21, 1975.

6. During the first part of 1970 petitioner was a commissioned salesman for the Zale Corporation and numerous other jewelry firms. The Zale Corporation, in 1970, brought an action against petitioner alleging he received certain kickbacks and commercial bribes. In August of 1970, the Zale Corporation

obtained an order of attachment against petitioner's bank accounts, said accounts having a collective balance of approximately \$26,000.00. The \$26,000.00 frozen in petitioner's bank accounts represented the \$26,000.00 escrow payment claimed as a deduction on his 1970 return and subsequently disallowed by the Internal Revenue Service. The action brought by the Zale Corporation against petitioner was discontinued via stipulation dated sometime in August of 1971. As the result of the aforementioned stipulation, petitioner paid over to the Zale Corporation in 1971 approximately \$20,241.88 of the \$26,000.00 frozen in his bank accounts.

7. Petitioner maintains that he in effect lost control and use of the \$26,000.00 frozen in his bank accounts in 1970 and that he should therefore be allowed the deduction in 1970 and not 1971. Petitioner also argues that the Audit Division's failure to allow a New York State credit for 1971 similar to the credit allowed on his 1971 Federal return, pursuant to section 1341(a)(5), is inequitable. Petitioner points out that the net New York State deficiency for 1970 and 1971, said deficiency having its basis solely on Federal adjustments, totals \$2,240.39, while the Federal deficiency for the same years, based on the same adjustments, totals only \$600.81.

CONCLUSIONS OF LAW

A. That petitioner has not shown that the \$20,241.88 paid to the Zale Corporation in 1971 was recognized as a fixed and definite obligation to repay in 1970 nor has he shown that provisions were made for repayment before the close of the 1970 tax year. Accordingly, the claim of right doctrine is appropriate in the instant matter (J. W. Gaddy v. Comm., 38 T.C. 943; United States v. Merrill, 211 F.2d 297).

B. That a deduction for the repayment of amounts previously reported as income under a "claim of right" is allowable as a deduction only in the year of repayment (U.S. v. Lewis, 340 U.S. 590; Healy v. Commissioner, 345 U.S. 278). Under the provisions of section 1341 of the Internal Revenue Code, petitioner's 1971 Federal income tax liability was required to be computed using one of two separate methods. The first method allows a deduction in the year of repayment (I.R.C. §1341(a)(4)), while the second method computes the 1971 tax liability without such deduction and subtracts therefrom the decrease in tax from prior years which would result solely from the exclusion of said disputed income from gross income for such prior taxable years (I.R.C. §1341(a)(5)). Under section 1341 of the Code, the Federal income tax liability is computed using the method resulting in the lowest tax. Petitioner's 1971 Federal liability was computed using the second method provided for in I.R.C. §1341(a)(5). This special computation of tax does not enter into the computation of Federal adjusted gross income or Federal itemized deductions for the year 1971 and said special computation of tax does not apply to New York since the New York Tax Law contains no comparable provision. This special computation of tax under the Federal Internal Revenue Code, however, does not alter the fact that a deduction would have been allowable under other applicable provisions of the Internal Revenue Code.

C. That absent any provision in Article 22 of the Tax Law providing for a special computation of tax similar to the computation provided for in I.R.C. §1341(a)(5), the Audit Division has correctly computed petitioner's New York State income tax liability for the years 1970 and 1971. See: Kreiss et al. v. State Tax Commission, ____ N.Y.2d ____, rev'g 92 A.D.2d 1048.

D. That the petition of Brian Weinberg is denied and the Notice of Deficiency dated September 8, 1980 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

JUN 15 1984

STATE TAX COMMISSION

Rodolfo A. C. C.
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. J.
COMMISSIONER