

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frederick & Maryann Getty :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax and :
Unincorporated Business Tax under Articles 22 and :
23 of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative 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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Frederick & Maryann Getty, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick & Maryann Getty
9 Melissa Drive
Farmingville, NY 11738

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
13th day of September, 1985.

David Parchuck

Bernie A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frederick & Maryann Getty :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax and :
Unincorporated Business Tax under Articles 22 and :
23 of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative 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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Michael B. Edwards, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael B. Edwards
Farkash, Kops & Edwards
223 Jericho Tpke.
Mineola, NY 11501

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
13th day of September, 1985.

David Parchuck

William A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 13, 1985

Frederick & Maryann Getty
9 Melissa Drive
Farmingville, NY 11738

Dear Mr. & Mrs. Getty:

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 and Chapter 46, Title U 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: Petitioner's Representative
Michael B. Edwards
Farkash, Kops & Edwards
223 Jericho Tpke.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FREDERICK and MARYANN GETTY	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
and Unincorporated Business Tax under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1977 and 1978.	:	

Petitioners, Frederick and Maryann Getty, 9 Melissa Drive, Farmingville, New York 11738, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1977 and 1978 (File No. 48235).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 21, 1985 at 2:15 P.M., with all briefs and additional documentary evidence to be submitted by July 11, 1985. Petitioners appeared by Farkash, Kops & Edwards (Michael B. Edwards, CPA). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioners filed a timely petition for redetermination of the New York State personal income tax, New York City nonresident earnings tax, and unincorporated business tax deficiencies asserted against them.

FINDINGS OF FACT

1. For the taxable years 1977 and 1978, petitioners, Frederick and Maryann Getty, filed joint New York State income tax resident returns, with New York City nonresident earnings tax. Mr. Getty submitted, in addition, unincorporated business tax returns, reporting the items of income from and expenses of a Mobil gasoline service station which he operates as a sole proprietorship.

2. On March 16, 1983, the Audit Division issued to petitioners a Notice of Deficiency asserting New York State personal income tax, New York City nonresident earnings tax and unincorporated business tax for 1977 and 1978 in the combined amount of \$9,143.93, plus penalties and interest. On September 6, 1983, the Tax Appeals Bureau of the State Tax Commission received from petitioners a petition seeking redetermination of the asserted deficiencies. It is petitioners' position that they never received the Notice of Deficiency and that they filed a timely protest in opposition to notices and demands for payment of income tax due, under date of July 21, 1983, which documents constituted their first notification of the Audit Division's assertion of the deficiencies.

3. In March, 1980, the Audit Division commenced an examination of petitioners' personal and business records. This examination, which consisted of cash availability and bank deposit analyses, disclosed additional, unreported income in 1977 and 1978 in the amounts of \$26,959.00 and \$24,897.00, respectively. Further, petitioners were unable to substantiate the basis for certain stock sold in 1978; the income tax examiner consequently disallowed the basis as claimed and treated the gain on the disposition as short-term. On October 18, 1982, the examiner forwarded to petitioners a Statement of Personal Income Tax Audit Changes and a Statement of Unincorporated Business Tax Audit Changes, proposing increments to petitioners' personal income tax, nonresident earnings

tax and unincorporated business tax liability for each of the years under consideration, scheduled as shown below.

a) Personal income tax and nonresident earnings tax

	<u>1977</u>	<u>1978</u>
Personal income tax	\$3,107.45	\$3,064.95
Nonresident earnings tax	188.23	174.48
Negligence penalty	164.78	161.97
Interest	<u>1,501.41</u>	<u>1,200.47</u>
Total	<u>\$4,961.87</u>	<u>\$4,601.87</u>

b) Unincorporated business tax

	<u>1977</u>	<u>1978</u>
Unincorporated business tax	\$1,414.00	\$1,194.82
Negligence penalty	70.70	59.74
Interest	<u>644.18</u>	<u>442.77</u>
Total	<u>\$2,128.88</u>	<u>\$1,697.33</u>

4. By letter to the examiner dated November 12, 1982, petitioners' accountant, Mr. Michael Edwards (their representative in the instant proceeding), objected to the proposed changes; his correspondence states, in pertinent part:

"I am in receipt of your statement of audit changes. It is my recollection that the agreed upon deficiency was much less than that shown in your statement. I hereby request that we meet in order to clarify the matter."

On December 29, 1982, Mr. Edwards forwarded to the examiner photocopies of certain bank records, purporting to demonstrate the availability to petitioners of additional sources of income.

5. On or about January 12, 1983, the examiner mailed to Mr. Edwards, for execution by petitioners, two consents to extend the period of limitations for assessment of personal income and unincorporated business taxes for the taxable years 1977 and 1978 to and including April 15, 1984. Petitioners signed and returned the consent agreements, which were then validated by the Audit Division on January 25, 1983. (Petitioners had previously executed other consent

agreements which served to validly extend the statute of limitations to April 15, 1983, inclusive.)

6. On February 7 and 8, 1983, the income tax examiner compiled his case file, including workpapers and schedules, for the purpose of transmitting it to the central office in Albany for preparation of the Notice of Deficiency. According to Department of Taxation and Finance records, specifically, the certified mail list of March 16, 1983, a Notice of Deficiency for 1977 and 1978 was sent to Frederick and Maryann Getty at 9 Melissa Drive, Farmingville, New York 11738, on said date via certified mail and was assigned by Department personnel certified control number 27456. The Notice was not returned to the Department by the United States Postal Service as being undeliverable or for any other reason.

7. On April 1, 1983, Mr. Edwards forwarded to the income tax examiner a handwritten note from one Joseph A. Fiore, purporting to evidence the availability to petitioners of additional income in the form of a loan to them by Mr. Fiore. Inasmuch as the examiner had already sent the case file to Albany, he incorporated this correspondence in his "work file," which he maintained at his office.

8. On July 21, 1983, subsequent to the expiration of the ninety-day period mandated by Tax Law section 681(c), the Audit Division issued to petitioners two notices and demands for payment of income tax due, assessing personal income tax, nonresident earnings tax and unincorporated business tax for the years 1977 and 1978 in the amounts as reflected in the Notice of Deficiency, plus penalties and interest calculated to the date of the assessments. Petitioners filed a petition for redetermination with the Tax Appeals Bureau, as aforesaid, on or about September 6, 1983.

9. Mr. Edwards acted as petitioners' representative throughout the course of the field examination and continues to act in that capacity to the present time. It was petitioners' practice to mail or to personally deliver to Mr. Edwards at his office all documents relevant to the examination, and consistent with this practice, they mailed to him the two statements of audit changes and the two assessments. Mr. Edwards never received the Notice of Deficiency, either directly from the Audit Division or indirectly from petitioners.

10. Mrs. Getty was aware of the conduct of the audit but chose not to participate therein, leaving the matter to Mr. Getty. She was at home during the day and in the event any correspondence arrived from the Department of Taxation and Finance, she set it aside for her husband. When asked at the hearing whether she recalled receiving the Notice of Deficiency dated March 16, 1983, she replied, "No, I don't." In response to the question whether she had received the assessments of July 21, 1983, she responded, "I honestly don't know." She did testify, however, that she always received the mail during the relevant period, and that it would have been impossible for anyone else to have received petitioners' mail.

11. Mr. Getty did not appear at the hearing to offer his testimony.

CONCLUSIONS OF LAW

A. That subsection (a) of Tax Law section 681 provides, in relevant part, as follows:

"If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer... A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

(Section 681 is made applicable to Article 23 by section 722. Section U46-31.0 of the Administrative Code of the City of New York contains language substantially

similar to that quoted above.) The Audit Division mailed the Notice of Deficiency for 1977 and 1978 to petitioners at their correct address via certified mail, thus fully complying with the requirements established by section 681(a). Once such compliance is shown, petitioners' failure to receive the Notice of Deficiency is immaterial. (Matter of Kenning v. Department of Taxation and Finance, 72 Misc.2d 929, affd., 43 A.D.2d 815, mot. for lv. to app. den., 34 N.Y.2d 653.)

B. That petitioners having failed to file a petition with the Tax Commission within ninety days after the mailing of the Notice of Deficiency, such Notice became by operation of law an assessment of the taxes specified in the Notice, and the Audit Division properly issued notices and demands for the taxes. (Tax Law section 681[b]; Administrative Code section U46-31.0[b].)

C. That the petition of Frederick and Maryann Getty is denied, and the Notice of Deficiency issued on March 16, 1983 is sustained.

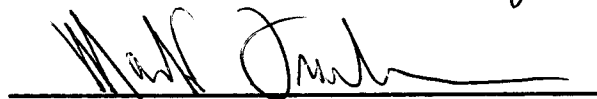
DATED: Albany, New York

STATE TAX COMMISSION

SEP 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER