

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benjamin and Doris Handy :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1977. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
James Winston :
for Redetermination of a Deficiency or for 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon James Winston, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Winston
47 Canandaigua Road
Palmyra, NY 14522

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
7th day of November, 1985.

David Parchuck

Bennie A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Richard B. Jeary, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard B. Jeary
10 Deachel Drive
Rochester, NY 14626

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
7th day of November, 1985.

David Parchuck

Normie Arbogast
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

James Winston
47 Canandaigua Road
Palmyra, NY 14522

Dear Mr. Winston:

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
Richard B. Jeary
10 Deachel Drive
Rochester, NY 14626
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benjamin and Doris Handy :
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of :
James Winston :
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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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Benjamin & Doris Handy, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benjamin & Doris Handy
1041 Stafford Road
Palmyra, NY 14522

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
7th day of November, 1985.

David Parchuck

Carrie A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Benjamin & Doris Handy
1041 Stafford Road
Palmyra, NY 14522

Dear Mr. & Mrs. Handy:

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.

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Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard B. Jeary
10 Deschel Drive
Rochester, NY 14626
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BENJAMIN AND DORIS HANDY	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

DECISION

In the Matter of the Petition	:	
of	:	
JAMES WINSTON	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioners, Benjamin and Doris Handy, 1041 Stafford Road, Palmyra, New York 14522, 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 (File No. 46930).

Petitioner, James Winston, 47 Canandaigua Road, Palmyra, New York 14522, 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 (File No. 46929).

A consolidated 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 February 6, 1985 at 1:15 P.M., with all documents to be submitted on or before February 14, 1985. Petitioners appeared by Richard B. Jeary, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioners may challenge the accuracy of a Notice of Deficiency premised upon Federal audit adjustments, when petitioners did not report the change increasing their Federal taxable income in accordance with Tax Law §659.

II. Whether petitioners are entitled to a modification of their New York adjusted gross income in the year 1977 based upon amounts which the Internal Revenue Service attributed to petitioners as income in 1977, but which were previously reported by petitioners to New York State in 1976.

FINDINGS OF FACT

1. On June 17, 1983, the Audit Division issued a Notice of Deficiency to petitioners, Benjamin and Doris Handy, asserting a deficiency of personal income tax for the year 1977 in the amount of \$374.45, plus interest of \$194.65, for a total amount allegedly due of \$569.10.

2. On August 19, 1983, the Audit Division issued a Notice of Deficiency to petitioner James Winston asserting a deficiency of personal income tax for the year 1977 in the amount of \$381.55, plus interest of \$204.33, for a total amount due of \$585.88.

3. The Statement of Audit Changes stated, in each instance, that the adjustment was made to conform with Federal audit changes.

4. In 1976, Benjamin Handy and James Winston were equal shareholders of Winston-Handy, Inc. ("the corporation"). For Federal purposes, the corporation elected to be treated as a small business corporation pursuant to subchapter S of the Internal Revenue Code for the year 1976. In 1977, the corporation chose to be taxed pursuant to subchapter C of the Internal Revenue Code.

5. Each of the deficiencies were premised upon adjustments made by the Internal Revenue Service which attributed dividend income to petitioners in the

year 1977 from Winston-Handy, Inc., which, petitioners explained, was based upon a late distribution of the 1976 small business corporation's taxable income. With respect to Benjamin and Doris Handy, the Audit Division attributed additional dividend income of \$2,751.50. The Audit Division attributed additional income of \$2,862.06 to James Winston for 1977.

6. The income which is at issue herein was reported by Winston-Handy, Inc. on its State of New York Corporation Franchise Tax Report for the year 1976 and, in their respective amounts, by the petitioners on their New York State Income Tax Resident Returns for the year 1976.

7. At the hearing, petitioners' representative acknowledged that petitioners did not report the change in their Federal taxable income to New York State.

CONCLUSIONS OF LAW

A. That section 659 of the Tax Law provides, in part, that if a taxpayer's Federal taxable income is changed or if a taxpayer's claim for credit or refund is disallowed in whole or in part, such taxpayer shall report such change within ninety days after the final determination of such change, correction or disallowance.

B. That where the Audit Division issues a Notice of Deficiency based upon a change in Federal taxable income by the Internal Revenue Service, such deficiency may be challenged by the filing of a petition within ninety days of the mailing of the Notice of Deficiency (Tax Law §681(b); compare Tax Law §681(e) which deals with the situation where the Audit Division issues a notice of additional tax due). Since petitioners timely filed petitions challenging the notices of deficiency, they are not prohibited from challenging the Audit Division's assertion that additional tax is due. It is noted that since petitioners failed to comply with section 659 of the Tax Law, any taxes due as

a result of said failure may be assessed at any time (Tax Law §683[c][1][C];
Matter of Lloyd Weaver, State Tax Commission, July 13, 1982).

C. That section 612(a) of the Tax Law provides that the adjusted gross income of a resident individual is his Federal adjusted gross income as defined by the laws of the United States for the taxable year, with certain modifications. Since petitioners have not presented any argument or evidence that the adjustments to petitioners' Federal taxable income by the Internal Revenue Service was incorrect, and since there were no applicable modifications of section 612(a) which were effective during the year in issue which would operate to petitioner's benefit, the corresponding adjustments by the Audit Division must be sustained. It is noted that any inequity which may result from the disparity between the United States and New York State statutes during the year in issue is a matter within the discretion of the legislature (see Matter of Kreiss v. N.Y.S. Tax Commission, 61 N.Y.2d 916).

D. That the petitions of Benjamin and Doris Handy and James Winston are denied and the notices of deficiency are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

Rodwin C. Clev
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Miller
COMMISSIONER